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No. 01-206

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN D. SZABO,

Petitioner,

v.

BRIDGEPORT MACHINES, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO RULE 29.6

Respondent, Bridgeport Machines, Inc., is a Delaware Corporation with its principal place of business in Bridgeport, Connecticut. It is a wholly-owned by Goldman Industrial Group, Inc.

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Bridgeport Machines, Inc. ("Bridgeport") respectfully opposes John D. Szabo, d/b/a Zatron's ("Szabo" or "Petitioner") Petition for a Writ of Certiorari ("Petition"). Szabo has not set forth compelling reasons for this Court to grant the Petition. First, the Petitioner has failed to show that this pre-judgment petition is "of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Supreme Court Rule 11. Second, the question presented by the Petitioner is neither raised by the record below nor the Seventh Circuit's decision. Third, the Seventh Circuit's decision is not in conflict with the holding of another United States court of appeal on the same important matter. Finally, the Seventh Circuit's decision did not address an important question of federal law that should be addressed by this Court. In fact, the Seventh Circuit's decision completely comports with both the spirit and the letter of this Court's decisions in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974) and *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). Therefore, the Petition should be denied.

PETITIONER HAS FAILED TO SHOW THAT HIS PRE-JUDGMENT PETITION IS OF IMPERATIVE PUBLIC IMPORTANCE

The Petitioner has failed to show that his pre-judgment petition "is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." Supreme Court Rule 11. Indeed, the Petitioner fails even to address this requirement. As set forth below, the Petition, which involves the legal standard by which a district judge reviews a motion for class certification pursuant to Fed. R. Civ. P. 23, does

not involve a matter of public importance, much less an imperative matter that requires the immediate, pre-judgment review of this Court. Indeed, the Seventh Circuit's decision vacated the district Court's order certifying this matter as a class action and remanded the matter for further proceedings. The district court has now set this matter down for a further hearing on class certification on April 8, 2002. Thus, it is likely that the district court will again address the class certification issue long before this proposed appeal could be heard. Accordingly, this matter is not presently ripe for consideration. *See, e.g., Virginia Military Institute v. United States*, 508 U.S. 946, 946 (1993) (recognizing that "[w]e generally await final judgment . . . before exercising our certiorari jurisdiction").

PETITIONER'S QUESTION PRESENTED IS NOT RAISED BY THE RECORD BELOW OR THE SEVENTH CIRCUIT'S DECISION

Neither the Seventh Circuit's decision, nor the record below, raise the question presented by the Petition. The Petitioner asks whether a District Court abuses "its discretion if it assumes that the substantive allegations of the complaint are accurate and does not conduct a preliminary inquiry to resolve factual disputes that relate to the merits of the claims" when it is "satisfied that it has a sufficient record to determine that the requirements for class treatment under Rule 23 of the Federal Rules of Civil Procedure have been met." Petition at i. This issue has little to do with the Seventh Circuit's decision and artfully avoids the principal issue that was presented on appeal.

The district judge, in this case, explicitly refused to consider Bridgeport's unrefuted evidence relating to

Fed. R. Civ. P. 23's ("Rule 23") mandatory requirements because it specifically found that "**this court must accept the substantive allegations of Szabo's complaint as true.**" Petitioner's Appendix ("Pet. App.") at 23 (emphasis added). Similarly, the district court refused to consider Bridgeport's evidence *relating to Rule 23's requirements* because it found that "**Bridgeport has inappropriately attempted to litigate the merits of Szabo's claims.**" *Id.* at 41 (emphasis added). Thus, the precise issue presented to the Seventh Circuit was whether the district court could ignore Bridgeport's evidence and accept all of the plaintiff's substantive allegations in determining whether Rule 23's requirements had been satisfied. It had nothing to do with the "sufficiency of the record" as Petitioner now claims.

In fact, the Seventh Circuit specifically addressed the issue of whether a district court *must* accept the substantive allegations of the complaint as true (including allegations relating to the Rule 23 factors) when deciding a motion for class certification where those facts are vehemently refuted and, additionally, whether a district court properly may refuse to consider factual information that *specifically relates to Rule 23's mandatory requirements* when those facts may also relate to the merits. The Seventh Circuit simply held that the district court applied the wrong legal standard in making the class determination.

Therefore, the question presented by the Petitioner does not stem from the facts or procedural history of this case as he suggests. Because the Seventh Circuit decided that the district court applied the wrong legal standard, it was not necessary for the Seventh Circuit to consider the sufficiency of the record. Thus, the question presented to the Seventh Circuit in Bridgeport's Petition for Permission to Appeal

Pursuant to Fed. R. Civ. P. 23(f) more accurately describes the district court's decision-making process in certifying this proposed class action:

> Did the District Court abuse its discretion in certifying this class action by accepting all of the plaintiff's unsupported factual allegations as true while refusing to consider Bridgeport's evidence?

As set forth below, the Seventh Circuit properly decided "yes" to this question. Bridgeport therefore respectfully urges this Honorable Court to deny the Petition.

FURTHER REASONS FOR DENYING THE WRIT

I. The Seventh Circuit's Decision is Consistent with this Court's Prior Decisions and is Not In Conflict with the Holding of Any United States Court of Appeals.

The Petitioner argues that the Seventh Circuit's decision below is in conflict with the holdings of several other United States courts of appeals. Specifically, the Petitioner claims that the Seventh Circuit's decision (which, he erroneously claims, "has directed district courts to make preliminary inquiries on the merits to resolve class issues") conflicts with the "holdings of several circuits directing district courts to assume the truth of the substantive allegations of the plaintiff's complaint in assessing whether class treatment is warranted." Petition at 20. This argument is without merit for the following reasons: (1) Szabo has mischaracterized the Seventh Circuit's holding; (2) the "holdings" of the other United States courts of appeals either do not stand for the proposition for which the Petition claims or are not valid law as they were decided prior to this Court's decision in

General Tel. Co. v. Falcon, 457 U.S. 147 (1982); and, most importantly, (3) the Seventh Circuit's decision is in complete harmony with this Honorable Court's previous decisions.

A. This Court Addressed the Appropriate Inquiry To Be Made In Determining Whether Rule 23 is Satisfied In Eisen And General Tel.

This Court addressed the appropriate inquiry to be made by a district court in deciding a Rule 23 motion in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), and *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982). The Seventh Circuit's determination is entirely consistent with these decisions.

In *Eisen*, this Court rejected the notion of allowing the district court to consider the likelihood of prevailing on the merits in determining whether a suit can be maintained as a class action. *Eisen*, 417 U.S. at 177. The *Eisen* court stated that "[w]e find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Id.* The *Eisen* Court further quoted the following with approval: "In determining the propriety of a class action, the question is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Id.* at 178 (*quoting Miller v. Mackey Int'l*, 452 F.2d 424, 427 (5th Cir. 1971)).

This prohibition against denying class certification based on the relative strength or weakness of a case appears to be the original source for the district court's erroneous

conclusion in this matter that it could not consider evidence that in any way related to the merits. In rejecting the district court's findings, the Seventh Circuit's decision was not novel or alone. In fact, the conclusion that a district court is *not* bound by the allegations of the complaint when determining class certification is supported by this Court's decision in *General Tel.* and widely recognized by other courts. *See Castano v. The American Tobacco Co.*, 84 F.3d 734, 744 (5th Cir. 1996) (finding that *Eisen* stands for the "unremarkable proposition that the strength of a plaintiff's claim should not affect the certification decision," and consequently does not limit the court from "looking beyond the pleadings"); *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984) (cautioning that *Eisen* "should not be talismanically invoked to artificially limit a trial court's examination of the factors necessary to make a reasoned determination of whether a plaintiff has met her burden of establishing each of the Rule 23 class action requirements"); *Eggleston v. Chicago Journeymen Plumbers' Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982) ("*Eisen* has not been interpreted so broadly, however, as to foreclose inquiry into whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23 as distinguished from an inquiry into the merits of plaintiff's particular individual claim"); *O'Neil v. Appel*, 165 F.R.D. 479, 496 (W.D. Mich. 1996) (finding that a court's refusal to undertake a "careful examination of the nature of plaintiffs' claims or the proof necessary to support them . . . is made possible only by a misreading of a single sentence in *Eisen*, coupled with a disregard of subsequent Supreme Court authority").

This Court's decision in *General Tel. Co. of Southwest v. Falcon*, 457 U.S. 147 (1982), makes clear that a district

court is not bound by the plaintiff's allegations when it addresses whether Rule 23's requirements have been met. In *General Tel.*, this Court found erroneous the district court's assumption that the plaintiff's discrimination claim was typical of other claims. *General Tel.*, 457 U.S. at 158-59. In other words, by assuming typicality, the district court failed to "evaluate carefully the legitimacy" of the plaintiff's claim that he was a proper class representative. *Id.* at 160. The Court further elaborated on the type of inquiry that a district court must conduct when determining whether a proposed class meets Rule 23's requirements:

> *[T]he class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action.* Sometimes the issues are plain enough from the pleadings to determine whether the interests of the absent parties are fairly encompassed within the named plaintiff's claim, and sometimes it may be necessary for the court to *probe behind the pleadings* before coming to rest on the certification question. . . .

Id. (internal quotations and citations omitted) (emphasis added). This Court went on to state that a class certification order is "inherently tentative" because "actual, not presumed" conformance with Rule 23 remains "indispensable." *Id.* Finally, this Court admonished that a class action may be certified only "if the trial court is satisfied, *after a rigorous analysis*, that the prerequisites of Rule 23(a) have been satisfied." *Id.* at 161 (emphasis added.)

The Petitioner here fails to recognize two important principles from *General Tel.* and, consequently, the Seventh

Circuit's decision. First, the *General Tel.* Court explicitly found (and, indeed, this Court had previously recognized) that the factual and legal issues that relate to the merits of a case may also relate to the factors for determining class certification under Rule 23; they are not mutually exclusive. Accordingly, the *General Tel.* Court explicitly endorsed "probing behind the pleadings" to ensure that Rule 23's requirements are actually met. Therefore, the *General Tel.* court approved a district court's inquiry, *beyond the allegations of the complaint*, into factual matters that relate to the Rule 23 factors, even if they also relate to the merits. This inquiry is, of course, separate and distinct from determining whether the plaintiff is likely to prevail on the merits of his claim, as is prohibited by *Eisen*.

B. The Seventh Circuit's Decision in this Case is In Complete Harmony with this Court's Decisions in Eisen and General Tel.

Regardless of whether any alleged "conflict" exists between the Seventh Circuit's decision and those of other circuits, the Seventh Circuit's decision is completely consistent with *Eisen* and *General Tel.* Thus, the Petition should not be granted. A further explanation of what the Seventh Circuit actually addressed and decided is necessary particularly in light of Szabo's mischaracterization of the Seventh Circuit's decision.

The Seventh Circuit simply decided that the district judge erred in accepting all of the plaintiff's substantive allegations as true and in refusing to consider facts relevant to class certification because they also related to the merits. In other words, the Seventh Circuit found that the district court erred in applying the same standard in determining

whether to certify this class as if deciding a Rule 12(b)(6) motion to dismiss. The Seventh Circuit recognized that there were many factual disputes below; it then observed:

> [t]here are other important disputes that we need not discuss, for the district judge handled all of them the same way: the judge assumed that whatever Szabo alleges must be true. [The judge proceeded] as if class certification under Rule 23 were governed by the same principles as evaluating the sufficiency of the complaint under Rule 12(b)(6). . . .

Pet. App. at 4. The Seventh Circuit quoted at length from the district court's opinion, citing to multiple, specific instances in which the district court identified factual and legal conflicts between the parties relating to Rule 23's requirements and then proceeded to reject, summarily, Bridgeport's attempt to contest plaintiff's class allegations. *Id.* at 4-5. The Seventh Circuit concluded: "[i]n sum, the district judge certified the class without resolving factual and legal disputes that strongly influence the wisdom of class treatment. The judge stated that he had no other option." *Id.* at 5.

The Seventh Circuit then held that Rule 23 does not require that a district judge accept all of the complaint's allegations as true when deciding whether to certify a class action. *Id.* at 6. It found, rather, that "a judge should make whatever factual and legal inquiries are necessary under Rule 23." *Id.* The Seventh Circuit further found that the district court must make these inquiries (even if they relate to the merits) reasoning that a district judge makes similar inquiries when resolving disputes over jurisdiction and

venue. *Id.* at 8. The Seventh Circuit also specifically addressed this Court's decision in *Eisen* and, furthermore, the 1996 amendment to Rule 23, which placed the timing of the class certification decision ahead of the decision on the merits. *Id.* at 8-9. While the Seventh Circuit agreed that a court may not refuse to certify a class because it did not find a probability of success on the merits, it also found that:

> nothing in the 1966 amendments to Rule 23, or the opinion in *Eisen*, prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in that rule and exercise the discretion it confers. ***Plaintiffs cannot tie the judge's hands by making allegations relevant to both the merits and class certification.***

Id. at 9 (emphasis added). The Seventh Circuit furthermore found that the district court's approach was similar to the approach explicitly rejected by *General Tel. Id.* at 10.

With respect to the case at hand, the Seventh Circuit commented that "[n]agging issues of choice of law, commonality, and manageability beset this case" and "[n]ow that the district court is free to pierce the allegations of the complaint, it may find that these and other daunting obstacles good reasons to deny Szabo's request for class certification or certify a more limited class." *Id.* at 10, 11. It therefore remanded the case to the district court for proceedings consistent with its opinion.

Thus, the Seventh Circuit did not, as Szabo contends, "direct[] district courts to make preliminary inquiries into the merits to resolve class issues." Petition at 20. Nor is "the effect of the decision below . . . to call for a broad-ranging

inquiry into the evidence in nearly all class action cases." *Id.* at 19. Such a reading is a gross exaggeration and a transparent attempt to interest this Court. The district court's decision clearly shows that it felt bound to accept Szabo's substantive allegations as true, even where they were specifically controverted by Bridgeport's evidence and specifically related to the mandatory requirements of Rule 23. The Seventh Circuit found that this complete "hand-tying" was legally erroneous. The Seventh Circuit certainly did not issue a broad-reaching directive to district courts to conduct inquires into the merits of a case in determining class certification as suggested by Petitioner. It only found that "a judge should make whatever factual and legal inquiries are necessary under Rule 23." Pet. App. at 6. This statement is entirely consistent with and very similar to the above-quoted statements in *General Tel.*

Indeed, the Seventh Circuit's decision has recently been cited favorably by the Third Circuit in *Newton v. Merrill Lynch*, __ F.3d __, 2001 WL 877524 at *3-5 (3d Cir. Aug. 6, 2001) (affirming denial of class certification). Unlike the decisions to which the Petitioner refers, the *Newton* court, much like the Seventh Circuit, explicitly addressed the standard for reviewing a class certification motion after *General Tel.* The Third Circuit found, as Bridgeport argues here, that *Eisen*'s prohibition against conducting a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action "must be examined in context." In *Eisen*, the issue was whether the class representative was required to provide notice to class members. *Newton*, 2001 WL 877524 at *4. The Supreme Court affirmed the court of appeals' reversal of the district court's decision that the defendant should bear 90% of the cost of notice because the plaintiff was

"more than likely" to prevail on his claims. *Id.* The *Newton* court has similarly observed that this Court's decisions in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.12 (1978), and *General Tel.* have allowed an inquiry into issues that relate to the merits when they also relate to Rule 23's mandatory requirements. *Id.* Finding that other courts, such as the Seventh Circuit, have agreed, the Third Circuit concluded:

> In reviewing a motion for class certification, a preliminary inquiry into the merits is sometimes necessary to determine whether the alleged claims can be properly resolved as a class action. This is such an instance. We must probe beyond the surface of plaintiffs' allegations in performing our review to assess whether plaintiffs' securities claims satisfy Fed. R. Civ. P. 23's requirements.

Id. at *5 (footnote omitted). Thus, because the Seventh Circuit's decision is completely in line with this Court's decisions in *Eisen* and *General Tel.*, the Petition should not be granted.

C. The Seventh Circuit's Decision Does Not Conflict with any Valid "Holding" of the Second, Ninth or Tenth Circuit.

The Petitioner makes the astonishing claim that the Second, Ninth, and Tenth Circuits have held that the "district court should accept the substantive allegations of the complaint as true in assessing the propriety of class treatment." Petition at 20. The Petitioner cites the following cases for this proposition: a footnote in a Tenth Circuit Decision; a Ninth Circuit decision; and three footnotes in three circuit court decisions that were decided before *General Tel. Id.* Each will be addressed in turn.

First, however, and most importantly, the statement in *General Tel.*, which endorses "probing beyond the pleadings," and recognizes that the facts that relate to Rule 23's mandatory requirements often also relate to the merits, forecloses any possible reading of *Eisen* that mandates a strict adherence to the factual allegations of the complaint in determining a class certification motion. Therefore, those circuit court cases relied upon by Petitioner must be read and interpreted in light of *General Tel.* To the extent that these circuit court decisions conflict with *General Tel.*, they are not valid law and cannot be relied upon by the Petitioner as a source for a valid "conflict" with the Seventh Circuit's decision.

A review of the cases that Petitioner cites as amounting to a "conflict" with the Seventh Circuit's decision is necessary. Although this is somewhat of a tedious exercise, a careful review of what these cases actually say; the context in which they were decided; when they were decided; and the cases upon which they, in turn, rely show that none of these courts have squarely held that a district court must accept the facts alleged in the complaint as true when they relate to Rule 23 requirements. To the extent that they contain dicta that indicates otherwise, they are not in accordance with *General Tel.* and do not amount to a "conflict" with the Seventh Circuit's decision in this case.

The Petitioner first cites to *J.B. v. Valdez*, 186 F.3d 1280, 1290 n.7 (10th Cir. 1999). Petition at 20, 21. In that case, the Tenth Circuit affirmed the denial of class certification because the plaintiffs failed to show commonality. *J.B.*, 186 F.3d at 1289. In footnote seven, the Tenth Circuit stated:

> We recognize that, when deciding a motion for class certification, the district court *should* accept

> the allegations contained in the complaint as true. *See In re Coordinated Pretrial Proceedings in Petroleum Prods. Litig.*, 691 F.2d 1335, 1342 (9th Cir. 1982); *Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978); Newberg & Conte, *supra*, at § 7.26. However, it "need not blindly rely on conclusory allegations which parrot Rule 23 requirements [and] may . . . consider the legal and factual issues presented by plaintiff's complaints." Newberg & Conte, *supra*, at § 7.26 (citing cases).

Id. (emphasis added). This footnote does not support Petitioner's claim of a "conflict."

The first sentence simply confirms the holding in *Eisen*, *i.e.*, that the merits of the claim cannot influence the class determination. It is important to note that the footnote goes on to state that the court may consider the legal and factual issues presented by the complaint. It obviously does not require the district court to blindly accept the complaint's allegations as true. Indeed, in *J.B.*, the Tenth Circuit *affirmed the denial of class certification*, which presumably would not have occurred if the district court were required to accept all allegations as true.[1]

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1. *J.B.* also relies on *Newberg on Class Actions*. Newberg recognizes, in the section relied upon, that there are different standards to be applied in deciding whether to certify a class based on the nature of the facts, and whether they are disputed, in each particular case. In other words, some cases are appropriately decided on the pleadings; some on affidavits (as was proposed by Bridgeport in this case); and others only after an evidentiary hearing. With respect to ruling on the pleadings, Newberg cautions that:

(Cont'd)

The Petitioner also cites *In re Coordinated Pretrial Proceedings in Petroleum Prods. Litig.*, 691 F.2d 1335, 1342

(Cont'd)

> For a class ruling based on pleadings and briefs only, argument made on legal conclusions and presumptions from class facts *which are undisputed* in the usual case is involved, and burden of proof concepts are not of significance beyond the prima facie showing of such class facts. When deciding a motion for class certification, the court should accept the allegations in the complaint as true, but need not blindly rely on conclusory allegations which parrot Rule 23 requirements. Courts may also consider the legal and factual issues presented by plaintiff's complaint.

Herbert B. Newberg and Alba Conte, *Newberg on Class Actions*, 3d Ed. 1992, § 7.26 at 7-84 – 7-85 (footnotes omitted) (emphasis added). Thus, Newberg clearly recognizes that this standard of review is appropriate only when the class facts *are undisputed*; even so, courts may still consider the legal and factual issues presented by the complaint.

Newberg also recognizes that when factual affidavits are filed that "dispute the class facts alleged in pleadings of the class representative, the burden may be shifted back to the class representative to file counter-affidavits, if appropriate, in order to overcome the general rule that facts in an undisputed affidavit must be taken as true, unless rebutted, for purposes of rulings on preliminary motions." *Id.* at 7-85 – 7-86 (footnote omitted). This is precisely what Bridgeport did at the district court level: it submitted several factual affidavits that challenged Szabo's class facts. *Szabo, however, did not rebut or dispute Bridgeport's evidence.* Therefore, Szabo failed to meet his burden at the district court level.

Finally, Newberg recognizes that

> [c]lass facts may be developed or rebutted during the course of a collateral evidentiary hearing, such as a hearing

(Cont'd)

(9th Cir. 1992) as a source of "conflict." Petition at 20, 21. In this case, the Ninth Circuit stated:

> Although in determining whether to certify the class, the district court is bound to take the substantive allegations of the complaint as true, *Blackie v. Barrack*, 524 F.2d 891, 901 n.7 (9th Cir. 1975), *cert. denied*, 429 U.S. 816, 97 S.Ct. 57, 50 L.Ed.2d 75 (1976), **the court also is required to consider the nature and range of proof necessary to establish those allegations.** *Id.* at 901.

In re Coordinated Pretrial Proceedings, 691 F.2d at 1342 (emphasis added). Again, as in *J.B.*, the court in *In re Coordinated Pretrial Proceedings* affirmed the district court's denial of class certification. Because the above-quoted sentence specifically states that the court is required to consider the nature and range of proof necessary to establish the allegations of the complaint, it too does not

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(Cont'd)

> on a preliminary or permanent injunction which precedes the class ruling, or during a special *evidentiary hearing to determine class facts*. Oral testimony at any evidentiary hearing prior to the class ruling prior to the class ruling which disputes class facts alleged in the complaint will require counter oral testimony or other evidence to rebut the new facts.

Id. at 7-87 (footnotes omitted). Clearly, therefore, Newberg recognizes that evidence via either affidavit or oral testimony that disputes class facts alleged in the complaint *shifts the burden to the plaintiff* to overcome the evidence. The allegations in the complaint are not the final word on class issues, as vehemently argued by Petitioner.

stand for the proposition that a court must blindly accept as true the complaint's allegations relating to the Rule 23 factors, as urged by Petitioner.

The Petitioner also cites to a footnote in *Blackie v. Barrack*, 524 F.2d 891, 901 n.17 (1975), a case decided well before *General Tel.* Petition at 20. In this footnote, the Ninth Circuit stated that:

> The court is bound to take the substantive allegations of the complaint as true, thus necessarily making the class order speculative in the sense that the plaintiff may be altogether unable to prove his allegations. While the court may not put the plaintiff to preliminary proof of his claim, it does require sufficient information to form a reasonable judgment. Lacking that, the court may request the parties to supplement the pleadings with sufficient material to allow an informed judgment on each of the Rule's requirements.

Blackie, 524 F.2d at 901 n.17. The Ninth Circuit, affirming the class certification order in that case, found that the judge had sufficient material, *other than the complaint*, before him in order to form a reasonable judgment on each of Rule 23's requirements and determined that the requirements were met. *Id.* at 900-01. In so finding, the Ninth Circuit explained that "[s]o long as [the district judge] has **sufficient material before him to determine the nature of the allegations, and rule on compliance with the Rule's requirements, and he bases his ruling on that material,** his approach cannot be faulted because plaintiff's proof may fail at trial." *Id.* at 901

(emphasis added). Thus, it is clear that the Ninth Circuit properly understood the limited nature of *Eisen*'s prohibition against requiring a plaintiff to show likelihood of success on the merits of his or her claims in determining whether to certify the class. It is also clear that the Ninth Circuit did *not* endorse the approach of accepting the plaintiff's allegations at face value. Indeed, the Ninth Circuit has since stated explicitly that "we are at liberty to consider evidence which goes to the requirements of Rule 23 even though the evidence may also relate to the underlying merits of the case." *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 509 (9th Cir. 1992) (*quoting In re Unioil Sec. Litig.*, 107 F.R.D. 615, 618 (C.D. Cal. 1985)) (internal quotation marks omitted).

Finally, the Petitioner relies on two footnotes in two other pre-*General Tel.* cases from the Second Circuit: *Shelter Realty Corp. v. Allied Maintenance Corp.*, 574 F.2d 656, 660 n.15 (2d Cir. 1978) and *Green v. Wolf Corp.*, 406 F.2d 291, 294 n.1 (2d Cir. 1968) Petition at 20, 21. In *Shelter Realty Corp.*, the Second Circuit refused to consider the defendant's interlocutory appeal of an order granting class certification under the then-applicable standards for appellate review of class certification decisions. Therefore, the Second Circuit never reached the merits of the appeal. Nevertheless, in footnote fifteen, the footnote relied upon by Petitioner for a "holding" that "conflicts" with the Seventh Circuit's decision in this case, the Second Circuit stated:

> As to appellants' argument that the trial court should not have decided the class motion on the basis of the complaint, we simply note that Judge Frankel was prohibited from conducting an inquiry into the merits by the Supreme Court in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94

> S.Ct. 2140, 40 L.Ed.2d 732 (1974) (Eisen IV); that he did consider the criminal information and numerous affidavits and documents relating to the class issues; and that we have previously held that it is proper to accept the complaint allegations as true in a class certification motion. *See Shayne v. Madison Square Garden Corp.*, 491 F.2d [397], 398 [2d Cir. 1974]; *Green v. Wolf Corp.*, 406 F.2d 291, 294 n.1 (2d Cir. 1968), *cert denied*, 395 U.S. 977, 89 S.Ct. 2131, 23 L.E.2d 766 (1969).

Shelter Realty Corp., 574 F.2d at 660 n.15. Although this footnote appears, at first blush, to reveal the source of the Petitioner's claimed "conflict" with the Seventh Circuit's decision, it certainly itself does not amount to a holding. Indeed, the appeal was not accepted. Moreover, a review of the two cases cited in footnote fifteen shows that they do not support such a holding.

In the *Shayne* case, the Second Circuit again dismissed an interlocutory appeal denying class certification and therefore did not address the propriety of the class certification ruling. In deciding whether interlocutory review was proper, it simply commented that "[s]ince this litigation is still in the pre-trial stage, the facts will be taken as alleged in the complaint or as they appear without dispute in the record before us." *Shayne*, 491 F.2d at 398. Thus, the *Shayne* case does not hold that a district court must accept the complaint's allegations as true when deciding a motion for class certification pursuant to Rule 23. To the extent it can be construed otherwise, it conflicts with *General Tel.*

Similarly, in the *Green* case, which was decided before both *Eisen* and *General Tel.*, the pertinent footnote relied upon by Petitioner and cited by *Shelter Realty Corp.*, states that:

> We have assumed for the purpose of this appeal, as we are required to do, that the "facts" stated in the complaint and accompanying papers submitted to Judge Ryan are true. No such finding, of course, is to be inferred.

Green, 406 F.2d at 294 n.1. Again, this cursory footnote does not amount to a holding. Furthermore, the "facts" presumed in that case included not simply the complaint, but other "papers" submitted to the judge, as opposed to the district judge's refusal to consider any of Bridgeport's facts in this case. Finally, because any reliance on *Green* as precedent is foreclosed by *General Tel.*, this footnote cannot amount to a holding that is in conflict with the Seventh Circuit's decision. Therefore, the Petition must be denied.

II. Whether an Evidentiary Hearing Was Required Was Not an Issue Below. Furthermore, There is No Existing Split Among the Courts of Appeal Regarding the Extent to Which an Evidentiary Hearing Regarding Class Certification is Warranted.

The Petitioner further claims that "[g]ranting the writ will give this Court an opportunity to resolve an existing split among the courts of appeals on the extent to which an evidentiary hearing is required in determining whether class treatment is warranted." Petition at 22. This argument does not present an issue meriting review for two reasons: first, this issue is neither addressed by the Petitioner's question

presented, nor does it arise from the facts and procedural history of this case; and second, there is no meaningful split among the courts of appeals regarding this issue.

Whether or not an evidentiary hearing should have been conducted was not squarely addressed below. Although the Petitioner claims that the need for an evidentiary hearing is "directly implicated" by the Seventh Circuit's decision and that the decision somehow "effectively creates a universal hearing requirement," the issue of an evidentiary hearing was never mentioned in the Seventh Circuit's decision. *See* Petition at 23, 24. Moreover, nowhere in Bridgeport's Petition for Permission to Appeal Pursuant to Fed. R. Civ. P. 23(f) did Bridgeport even mention an evidentiary hearing.

Indeed, the notion of an evidentiary hearing was not raised in this case until after the district court initially granted class certification and Bridgeport asked the district court to reconsider its decision. Bridgeport repeatedly argued (and the Seventh Circuit later agreed) that the district judge was required to consider Bridgeport's evidence relating to the plaintiff's ability to prove compliance with Rule 23's mandatory requirements. Memorandum of Law in Support of Motion for Reconsideration, pp. 2-9. In support of its argument that the district court should have considered the evidence it proffered relating to Rule 23's mandatory requirements, Bridgeport pointed to the *Manual of Complex Litigation* and the many circuit court decisions that have found that an evidentiary hearing on class certification is appropriate where class facts are disputed. Memorandum of Law in Support of Motion for Reconsideration, p. 10. Bridgeport then recited the numerous instances in which the district court ignored Bridgeport's unrefuted evidence (via affidavit and Petitioner's own deposition transcript) that showed the Rule 23's requirements had not been met. Memorandum of Law in

Support of Motion for Reconsideration, pp. 13-15. Although Bridgeport's position has always been that its uncontroverted evidence unequivocally shows that Rule 23's requirements were not met and, thus, class certification should have been denied,[2] Bridgeport stated that if the court, *upon reconsideration*, found that there were factual disputes regarding Rule 23's requirements (the court's position on which was unknown since it explicitly refused to consider Bridgeport's facts), it should then hold an evidentiary hearing. Bridgeport then requested that the district court reconsider its decision and either "deny class certification on the record presently before it; or, set this matter down for an evidentiary hearing to 'probe' the underlying facts regarding whether plaintiff can satisfy the requirements of Rule 23." Memorandum of Law in Support of Motion for Reconsideration, p. 20. Therefore, the district court's conclusion that Bridgeport contended that the court "should have conducted an evidentiary hearing on the motion for class certification" is not accurate.

Quite simply, this Petition has nothing to do with whether an evidentiary hearing should have been held, since, as the Seventh Circuit noted, the district court erred by accepting all of the complaint's allegations as true and in refusing to consider any of Bridgeport's evidence that related to Rule 23's requirements. Under that erroneous legal standard, an evidentiary hearing would never be required.[3]

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2. Indeed, Newburg apparently agrees with this position. *See supra* n.1.

3. After the Seventh Circuit's decision, however, the district court ordered that an evidentiary hearing on the issue of class certification will be held in April, 2002.

Additionally, the Petition should not be granted because there is no "existing split on the extent to which an evidentiary hearing is required in determining whether class treatment is warranted." Petition at 22. The Petitioner claims that there are three distinct "approaches" among the circuits as to when an evidentiary hearing on class certification is appropriate. *Id.* at 23. A review of Petitioner's argument, on its face, shows that these different "approaches" hardly amount to a conflict among the circuits. The most that can be said about these subtle distinctions is that two circuit courts of appeal recommend more strongly than others that a evidentiary hearing occur before a class certification motion is decided. Indeed, no court of appeal mandates that an evidentiary hearing be conducted. Thus, there is no true "conflict" among the circuits and this "issue" does not merit this Court's review.

Again, the Petition, on its face, does not suggest otherwise. The Petitioner first cites to a Second Circuit decision which states that an evidentiary hearing is required if the district court is inclined to *deny* class treatment. Petition at 23. Clearly, the district court here was not inclined to deny class treatment. Thus, this is hardly a split of authority. More importantly, however, the Second Circuit clearly stated that "evidentiary hearings are not mandated in every Rule 23 case." *Marcera v. Chinlund*, 565 F.2d 253, 255 (2d Cir. 1977), *vacated on other grounds sub nom Lombard v. Marcera*, 442 U.S. 915 (1979).

The Fifth and Eleventh Circuits recommend that an evidentiary hearing take place on class certification in most cases. Again, however, they do not mandate an evidentiary hearing in all instances. *See, e.g., Merrill v. Southern Methodist Univ.*, 806 F.2d 600, 608 (5th Cir. 1986) (stating

that district court should ordinarily conduct evidentiary hearing on class certification); *Morrison v. Booth*, 730 F.2d 642, 644 (11th Cir. 1984) (same).

The Petitioner states that the remaining circuits have "left the matter to the sound discretion of the district court." Petition at 23. The remaining circuits, far from remaining neutral on this topic, however, have also specifically recommended that district courts hold evidentiary hearings, particularly when there are factual disputes relating to class certification. For example, in one case cited by the Petitioner, the Fourth Circuit stated:

> It is seldom, if ever, possible to resolve class representation questions from the pleadings, and where facts developed during discovery proceedings are inadequate, an evidentiary hearing should be held on the request of the parties or, if necessary for a meaningful inquiry into the requisites of Rule 23, by the court sua sponte.

International Woodworkers of America v. Chesapeake Bay Plywood Corp., 659 F.2d 1259, 1268 (4th Cir. 1981) ("We have often emphasized the value of[,] . . . where the pleadings and discovery leave doubt as to the propriety of certification, the need for an evidentiary hearing on the question"); *see also, e.g.*, *Fink v. National Sav. and Trust Co.*, 772 F.2d 951, 960 (D.C. Cir. 1985) (criticizing district court for not holding hearing on class certification issues and noting that review was rendered impossible due to such failure). Therefore, in light of the recognized value of an evidentiary hearing when there are disputed issues of fact with respect to Rule 23's requirements, there can hardly be said to be a "conflict" among the circuits that more strongly recommend a hearing and those that only encourage it.

In fact, rather than supporting the Petition, the circuit courts' favoring of evidentiary hearings on Rule 23 motions is further indication that the Seventh Circuit correctly vacated the district court's order certifying the class in this matter. If the district court were correct in completely accepting all of the plaintiff's allegations as true and ignoring contrary evidence regarding Rule 23's factors, class certification hearings would largely be irrelevant. Plaintiffs' counsel would simply craft artful pleadings that show facial compliance with Rule 23's requirements.

PETITIONER MISSTATES FACTS IN HIS STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.2, Bridgeport has identified below misstatements of fact contained in the Petition that bear on the issues that properly would be before this court if certiorari were granted. Petitioner makes several inaccurate statements in his Statement of the Case. First, Szabo claims that he could not operate Bridgeport's machine "at speeds consistent with Bridgeport's specifications without producing parts with a poor finish that resulted from dwell marks." Petition at 2. Szabo, however, specifically acknowledged in his deposition that the machine performs properly and within specifications for his present workload. Szabo Depo. at 169.

Second, the Petitioner claims that his complaint is premised only on the following written documents: a brochure he received before purchasing the machine, and the form contract furnished by the distributor, and "not oral statements." Petition at 3. Similarly, Szabo contends that the Seventh Circuit "misspoke" regarding the issue of reliance on "oral" versus "written" representations because

"Bridgeport's written representations, not oral statements, formed the basis of his suit." Petition at 15 n.8.

Notwithstanding Petitioner's assertions, it is clear from both Szabo's Amended Complaint and his deposition testimony, that his claim is dependent upon *both* the alleged oral representations made to him by the Bridgeport Distributor, Advance Machinery Company, Inc. ("Advance Machinery"), as well as the written materials. Indeed, Petitioner alleges in his Amended Complaint that:

> In April 1997, plaintiff had various conversations with representatives of Bridgeport in an effort to determine whether the Company's vertical machining centers would be adequate to perform 3-D mold work. Ultimately, in April 1997, plaintiff had a telephone conversation with Steve Meussling, a sales engineer employed by Advance Machinery Company, Inc. ("Advance Machinery"), Bridgeport's agent and distributor in the State of Indiana, in which Meussling assured Zatron that the VMC 800 was suitable to perform 3-D mold work.

Amended Complaint, ¶ 31. Plaintiff further admitted in his deposition, that the machine's brochure does not explicitly mention 3-D machining. Szabo Depo at 109. He further acknowledged that his decision to purchase the machine was based on the oral representations of the Advance Machinery salesmen, which included "in depth discussions" regarding the machine's ability to perform complex 3-D work. Szabo Depo at 86-94. Szabo also attended a demonstration of the machine at Advance Machinery's showroom and decided to purchase the machine after this demonstration

and conversations with Mr. Meussling. Szabo depo at 87, 92. Therefore, it is clear that Szabo's decision to purchase the machine, and his understanding of its capabilities, was based on a variety of important factors only one of which was the review of the written brochure. This is an important distinction particularly because Petitioner has acknowledged in his deposition that the machine performs within specifications for less complex work.

Bridgeport emphasizes, however, that the Seventh Circuit did not determine these or any other of the many factual and legal disputes regarding Szabo's inability to meet Rule 23's requirements. Again, the Seventh Circuit's decision addressed the legal standard of review to be applied when considering a class certification motion. The facts supporting as well as weighing against compliance with Rule 23's requirements are not at issue before this Court.

CONCLUSION

For all of the foregoing reasons, Bridgeport respectfully requests that this Honorable Court deny the Petition.

Respectfully Submitted,

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